

# OFFICE OF THE ATTORNEY GENERAL



94-00155

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Municipalities - Retirement  
System - Employees, Employers,  
Employment - Benefits

Under facts presented, the  
City of Heflin may not pay  
retirement benefits to  
employees already retired.

Dear Mr. Parker:

This opinion is issued in response to the request which  
you forwarded on behalf of the City Council of the City of  
Heflin.

## QUESTIONS

(1) Inasmuch as the City was "financially  
unable" to continue in the Plan, did the  
City properly revoke its participation in  
the Plan?

(2) Having revoked its participation  
based upon its financial inability, as  
provided for in Code of Alabama 1975,  
§ 36-27-6(h), will the City jeopardize  
the validity and/or propriety of its  
prior withdrawal from the Plan should it  
now attempt (assuming it can afford to do  
so) to reinstate full benefits to the  
aforementioned five individuals by  
funding the unfunded liability held in

their respective accounts? More specifically,

(a) Will the City's possible, present ability to pay such unfunded liability, less than almost one year after such withdrawal, in some way inadvertently evidence its "financial ability" to have continued participation in the Plan in the past and/or to participate in the Plan currently and in the future?

(b) If the answer to (2)(a) is in the affirmative, will the City thereby be considered a member of the System and in the Plan or, instead, will it be forced to become a member of the System and in the Plan?

(c) If the answer to 2(b) is in the affirmative, will the City, if it again must withdraw from the System and Plan thereafter, be forced to proceed solely under the provisions of §36-27-6(j)?

(d) If the answer to 2(c) is in the affirmative, will the City then be required to maintain the rights and privileges, and maintain the reserves, of all prior participants in the Plan with the System?

(3) In view of the language found in §36-27-6(a), Code of Alabama 1975 (Cumm. Supp. 1993), do such five individuals have any remedy against the City other than the believed exclusive remedy provided for in §36-27-6(h), which has already, in effect, been utilized by such five individuals, should the City again conclude that it is still not financially able to restore their full benefits?

(4) Is there any other Alabama law, statute, rule, regulation and/or provision, and/or any such federal counterparts, that

would otherwise prohibit the City from restoring to such five former employees their full benefits, and/or, if such restoration takes place, that would thereby enable any past, present or future employees of the City to then have claims of some kind against the City?

#### FACTS AND ANALYSIS

The City of Heflin joined the Employees' Retirement System of Alabama pursuant to §36-27-6, Code of Alabama 1975, effective June 19, 1991. However, on December 22, 1992, the City Council terminated its participation in the Employees' Retirement System by adoption of a resolution acknowledging its financial inability to continue participation due to the City's poor financial condition, such termination effective December 31, 1992.

The City has five former employees, four of whom are receiving retirement benefits and one who is vested and entitled to receive benefits upon obtaining age 60. Pursuant to the provisions of §36-27-6(h), Code of Alabama 1975, the monthly retirement benefits paid to these individuals have been substantially reduced. The City Council and Mayor have expressed concern about the adverse effect of the City's withdrawal from the Employees' Retirement System upon these individuals' benefits and is exploring the possibility that they might be able to continue full benefits to these five individuals although the City is unable to finance the retirement program for all of its employees.

If the City was financially unable to continue in the Plan, §36-27-6(h), Code of Alabama 1975, specifically requires that the City's participation be terminated and that the assets deposited with the Retirement System be allocated among the retired and vested employees. The statute specifically provides that, except for the payment of such allocated benefits, the rights and privileges of active members and pensioners shall be terminated. Thus, the City may not fund the payment of additional benefits through the Retirement System.

In an opinion to Honorable Larry K. Anderson, City Attorney of Dothan, under date of October 28, 1986 (87-00022), this office held that a city could pay insurance premiums for presently retired employees only if retired employees had the

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expectation that such payments "were understood to be an incident of employment during the time of active employment." Your request does not state that now-retired employees expected retirement pay from any source other than the State Retirement System. Therefore, it appears, from the facts presented, that for the City to now fund additional benefits for retired employees would violate Constitution of Alabama 1901, §§ 68 and 94, as amended. While this appears to be a harsh conclusion, we are bound by those constitutional provisions applicable to this situation which prohibit paying employees for work already performed. Whether the ability of a municipality to make direct payments to retired employees would evince a present ability by the City to fully fund participation in the Retirement System is a question of fact as to which the Attorney General expresses no opinion. It would depend upon the relative amounts necessary to fully fund the System and the amount necessary to pay the direct benefits. The City's termination of participation would not, however, be reversed except by a judicial decision to that effect.

#### CONCLUSION

As noted above, §36-27-6(h) specifically provides that the rights and privileges of active members and pensioners under the retirement plan shall terminate when an employer terminates participation in the Employees' Retirement System pursuant to such section except for the benefits paid from the allocated assets. Your questions as to whether these individuals may have some other remedy against the City or whether other employees might have some claim of some kind against the City are much too broad and call for too much speculation for the Attorney General to attempt to answer.

Sincerely,

JIMMY EVANS  
Attorney General  
By:

  
JAMES R. SOLOMON, JR.  
Chief, Opinions Division

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